

Chapter 37



THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

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CHAPTER 37

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

OUTLINE

I. INTRODUCTION.

A. Structure of the Act.

1. Article I - General Provisions.
2. Article II - General Relief - reduced interest rate, stay of court proceedings, default judgment protection.
3. Article III - Special Protection - landlord tenant issues, mortgage foreclosure, installment contracts.
4. Article IV - Tax Protection, Powers of Attorney, Professional Liability Insurance Protection.
5. Others - The SSCRA contains other provisions such as life insurance guarantees (Article IV) and provisions regarding public lands (Article VI). These other protections are beyond the scope of this outline. [This outline is keyed to the current SSCRA statute sections at 50 U.S.C. App. §500 et. seq., rather than to the sections of the original SSCRA.]
6. Best Sources of SSCRA Guidance: LAAWS BBS/JAGNET, and JA 260, SSCRA Guide.

7. SSCRA Amendments.

- a) Future Financial Arrangements - added 50 U.S.C. App. § 518. Future Protection for Persons using the SSCRA. The fact that a person has availed himself of protection under the Act may not be reported as adverse information against him and used to deny him credit in future financial arrangements. CAVEAT: This "safe-harbor" does not prevent an institution from reporting a failure to comply with an underlying obligation.
- b) Added U.S. Air Force and Reserve Component coverage explicitly to the Act.
- c) Durable Powers of Attorney for MIA's. All POA's for military are deemed durable for the entire period of imprisonment for POW's notwithstanding expiration dates contained in the document itself.
- d) Added 50 U.S.C. App. § 592 - Professional Liability Insurance for Certain Persons Ordered to Active Duty in the Armed Forces.
 - (1) Applies to health care professionals or other persons as determined by the Secretary of Defense [possibly including Reserve Component attorneys].
 - (2) Who had liability coverage in force before coming on active duty.
 - (3) Allows for suspension of policy while on active duty, refund of premiums attributable to active duty time and guarantees reinstatement of insurance at termination of active duty.
- e) Added 50 U.S.C. App. § 593 - Reinstatement of Health Insurance Coverage upon release from Service.

II. ARTICLE I - GENERAL PROVISIONS OF THE SSCRA.

- A. Purpose: The Purpose of the Act is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).
- B. Constitutionality: The SSCRA is constitutional. Although it arguably interferes with the administration of justice within the states, courts have found that this interference is permissible as an exercise of Congress' power to raise and support the military forces under Article I, § 8 of the Constitution. *See, e.g., Radding v. Ninth Federal Savings & Loan Assoc.*, 55 F. Supp. 361 (D.C. N.Y. 1944).
- C. Protected Persons .
 - 1. Active Duty.
 - 2. Reserves while in active federal service.
 - a) Annual Training - applicable due to language of the Act - The term "person in the military service" includes "... federal service on active duty with any branch of service heretofore referred to... (§ 511) "... and any member of a reserve component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits...." (§ 516).
 - b) In re Brazas, 662 N.E.2d 559 (Ill. 1996). Appellate court holds that trial court abused its discretion by holding a hearing on divorce case issue when judge and opposing counsel were aware defendant on Reserve Active Duty for Training (ADT) status. See also *United States v. Stephan*, 490 F.Supp. 323, 325 (W.D. Mich. 1980).
 - 3.

National Guard - Only if in active federal service.

- a) DAJA-AL 1991/1884 21 June 1991 - State national guard personnel on full-time state duty are not covered by SSCRA.
 - b) Research Tip - Do not overlook state protections such as LA Rev. Stat 29: §§ 401-425, and PA. Code Vol. 51, PA-C.S.A. §§ 7309-7316 (1990) which provide similar relief to military persons in state service.
- 4. Dependents - For Article III protections - protection available in their own right (other protections may be derivative).
 - 5. Others - sureties, guarantors, etc. - 50 U.S.C. App. § 513.

D. Period of Coverage.

- 1. Commencement.
 - a) Active Duty - date of entry.
 - b) Inductees - date of receipt of orders.
 - c) Reserve Components - date of receipt of orders for Articles I-III, date of reporting for all other protections.
- 2. Termination.
 - a) Ordinary - Date of discharge terminates some coverage. Some protections extend for a limited time beyond discharge but are tied to discharge date.
 - b) Misconduct.

- (1) Court-Martial - Soldier serving sentence for violent assault has divested himself or herself of protections of the Act. *Mantz v. Mantz*, 69 N.E. 2d 637 (Ohio C.P. 1946).
- (2) AWOL - Depends on reasons for AWOL.
 - (a) Soldier who "extended furlough" to attend birth of child still entitled to protection. *Shayne v. Burke*, 27 So.2d 751 (Fla. 1946).
 - (b) Soldier AWOL with whereabouts unknown not entitled to SSCRA protection. *Harriott v. Harriott*, 511 A.2d 1264 (N.J. 1986), and *U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), *related case*, *Marriage of Hampshire*, 934 P.2d 58 (Kan. 1997).
 - (c) Self-inflicted injury. Marine who was hospitalized as a result of a self-inflicted gunshot wound not entitled to use SSCRA to stay judicial proceedings. *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind.App., 1995).

c) Waiver.

- (1) Written [50 U.S.C. App. Section 517].
- (2) Executed after effective date of coverage.
- (3) Specific - Waiver of one provision does not waive others. *See Harris v. Stem*, 30 So.2d 889 (LA Ct. App. 1947). Court held that waiver of rights against seizure of property did not affect tolling of statute of limitations.

3. Jurisdiction .

- a) Applies in all courts in United States.

- b) Collateral Review of State decisions in Federal Court? - NO - *Shatswell v. Shatswell*, 758 F. Supp 662 (D. Kan. 1991). *See also* *Scheidegg v. United States*, 715 F. Supp. 11 (D. N.H. 1989)(SSCRA is not a grant of subject matter jurisdiction to seek review of state court decisions in federal court).
- c) Private Cause of Action ? - Generally no independent cause of action for SSCRA.
 - (1) *United States v. Bomar*, 8 F. 3d 226 (5th Cir. 1993). United States Attorney pursued criminal sanction for violation of Act.
 - (2) *McMurtry v. City of Largo*, 837 F. Supp. 1155 (M.D. Fla. 1993). No federal cause of action for federal jurisdiction. Soldier's failure to use remedy under SSCRA does not permit later cause of action to retrieve the lost remedy.
 - (3) Use the remedy of the SSCRA in the applicable action or combine it with other causes of action as an equitable argument. *Garramone v. Romo, et. al.*, 94 F.3d 1446 (10th Cir. 1996) (Plaintiff may assert SSCRA rights as part of a civil rights action under 42 U.S.C. Section 1983.)
 - (4) *Moll v. Ford Consumer Finance Company, Inc.*, __ F. Supp. __, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998). A district court has held that the 1991 Amendments to the SSCRA [§518(2)(B)] create a private cause of action for recouping interest charged above the 6 % interest cap [§526].

III. ARTICLE II - GENERAL RELIEF (50 U.S.C. APP. §§ 520-527).

- A. Key Concept - Material affect requires a showing that the service member's military service has materially affected the service member's ability to fulfill the civil obligation.

B. 6% Interest Cap (50 U.S.C. App. § 526).

1. Limits interest to 6% for duration of military service.
2. Criteria.
 - a) Applies only to obligations incurred before entry onto active duty.
 - b) Service member now on active duty, and,
 - c) Military service materially affects ability to pay. Fed. Home Loan Mortgage Corp. v. Sincaban (unpublished) (U.S. Dist. Ct. W. D. WI. Order # 93-C-0090-C 13 Dec 93). Reserve doctor called to AD with reduced income. Creditor Bank discovered she had substantial investment income in millions - HELD - no material affect. Judge indicates that creditors may look at “totality of circumstances” to determine material affect, including spouse’s income, and accumulated assets.
 - d) Effective at entry on active duty/notice of activation. not at time of invocation of right
3. Notice to lender. [Sample Letter to Lender at Appendix A.]
 - a) With copy of orders.
 - b) Burden. On lender to seek relief in court if lender asserts no material affect

C. Issue of how to implement 6% reduction.

1. Various asserted methods.
 - a) Forgive all interest above 6% (DOD/DOJ position).

- b) Reduce rate but not payment. [This ploy was discouraged by the Comptroller of the Currency. *See* Advisory Memo, 1991 OCC CB LEXIS 13 (1991).]
 - c) Add interest above 6% to loan balance.
- 2. DOD/DOJ position adopted during Desert Shield/Storm by national lending associations. [Joint Hearing before the House and Senate Veteran Affairs Committees on SSCRA, 101st Cong., 2d Sess. (12 Sep. 1990), *as reported in* The Army Lawyer, p. 50, Nov. 1990.]
- 3. SSCRA does not apply to federally guaranteed student loans (according to DOE interpretation).
 - a) Title 20, U.S. Code Section 1078(d). (Federally insured student loans are not subject to any interest rate limits.) Memorandum, Department of Education (DOE), to the Office of the Staff Judge Advocate, Camp Lejune, North Carolina (1 April 1993); DOE Memorandum, GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations (29 August 1990).
 - b) Military deferments are no longer granted for student loans but soldiers may have loan payments deferred for up to six months or more for economic hardship upon request to lender/DOE IAW 34 C.F.R. § 682.211.
- 4. *See also* United States ex. rel. Bennett v. American Home Mortgage, (D. N.J.) (unpublished) (settled out of court after U.S. Attorney initiated suit on behalf of service member against lender that refused to lower payment).
- 5. Responses to Creditor Refusal to honor 6% interest provision. Pottorff, James P., “*Contemporary Applications of the Soldiers’ and Sailors’ Civil Relief Act*,” 132 MIL. L. REV. 115 (1991).

6. Moll v. Ford Consumer Finance Company, Inc., ___F.Supp. ___, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998). Military members may file private cause of action to enforce the 6% interest cap provision of 50 U.S.C. App. § 526.

D. Stay of Proceedings (50 U.S.C. app. § 521).

1. Who.
 - a) Both military plaintiff and defendant may request.
 - b) But not plaintiff's attorney if the attorney is the person called to active duty. Salazar v. Rahman, 1993 WL 22085 (Tex. Ct. App. 1993)(unpublished).
 - c) And not if a service member is a material witness - not a party. Ohio v. Gall, 1992 WL 217999 (Ohio Ct. App. 1992)(unpublished).
2. What Proceedings.
 - a) Civil Court Hearings.
 - b) Bankruptcy Debtor/ Creditor Meeting ?- Yes - In re Ladner, 156 B.R. 664 (Bankr. D. Colo., 1993).
 - c) Administrative Hearing? No. ISSUE: The new Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325,363, 110 Stat. 2105 (1996), requires states to set up administrative proceedings to expedite handling of child support and paternity claims which are not subject to SSCRA stay protection. Drafters ignored DoD request to include SSCRA stay protections for such hearings.
3. When may you request a stay? Soldier may make the request at any stage of the proceedings. ISSUE: What is the impact of the Internet, video teleconferencing, video depositions on determinations of unavailability?

- a) *But see* Massey v. Kim, 455 SE2d 306 (Ga. Ct. App. 1995) (Military defendant seeks stay to delay civil discovery until completion of overseas tour. Court rejects request pointing out improvements in modern communications since the passage of the SSCRA.);
 - b) Keefe v. Spangenberg, 533 F.Supp. 49 (W.D. Okla. 1981) (Court denies stay request to delay discovery and suggests that service member agree to video tape deposition, IAW Fed. R. Civ. P. 30(B)(4)); and
 - c) In re Diaz, 82 B.R. 162, 165 (Bankr. Ga. 1988) (“Court reporters may take depositions in Germany including videotape depositions for use in trials in this country.”).
4. Duration of stay - Period of service plus 60 days. Key = Reasonableness!! Keefe v. Spangenberg, 533 F.Supp. 49, 50 (W.D. Okla. 1981). Court grants soldier stay request for a one month continuance, but denies soldier request for a stay until his expected date of discharge three years later.
5. Burden of Proof - Boone v. Lightner, 319 U.S. 561 (1943) - at discretion of trial court.
- a) As a practical matter - assume the burden is on the service member to show service has materially affected the ability to appear in court.
 - b) Military member must show material affect:
 - (1) Unavailability to Appear [no ability to take leave]: ISSUE: The new Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for service members to appear in court and administrative paternity and child support hearings. See Pub. L. No. 104 - 193, § 363, 110 Stat. 2105 (1996).

(a) Unsuccessful.

- (i) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) - Court affirms adverse judgment against overseas soldier where soldier failed to use 38 day leave stateside to resolve pending support modification action.
- (ii) Underhill v. Barnes, 288 S.E. 2d 905 (1982). Soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.
- (iii) Palo v. Palo, 299 N.W. 2d 577 (S.D. 1980) - Both parties were service members assigned to Germany. Wife took excess leave and emergency loan to travel to United States for divorce hearing. Husband made no showing of inability to do the same.
- (iv) Rogers v. Tangipahoa Parish Sheriff's Office, 1997 WL 466922 (E.D. La. 1997); Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996); and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994). (Soldier must make an actual showing of unavailability, including an effort to obtain leave. No showing and stay request denied.)

(b) Successful.

- (i) Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (Sailor deployed at sea sends affidavit from superior officer attesting to inability to appear or take leave for a limited period because of military sea duty.)
 - (ii) Cromer v. Cromer, 278 SE2d 518 (N.C. 1981) (Sailor deployed on nuclear submarine has letter and affidavit from commander attesting to his inability to take leave until the submarine got to port.)
- (2) Actual Prejudice resulting from Non-Appearance.
 - (a) Sole issue at trial-uncontested facts=NO STAY.
 - (i) Real Property Valuation. Cooper v. Roberts, 722 SW2d 910 (Ky. Ct App. 1987).
 - (ii) Child Support Determination based upon income formula, where income is not disputed, or by Revised Uniform Reciprocal Enforcement of Support Act. Jaramillo v. Sandoval, 431 P2d 65 (N.M. 1967); 42 U.S.C. §§ 651-667 (1990); State *ex. rel.* Adams v. Adams, 455 NW2d 227, 230 n.2 (S.D. 1990)[RURESA]; *But see* Schmidt v. Schmidt, 444 NW2d 367, 372-73 (S.D. 1989) (Henderson, J., dissenting).
 - (iii) Uncontested Divorce Hearings. Palo v. Palo, *supra*.

- (iv) Appeal of Judgment. Kesler v. Kesler, 682 SW2d 44, 45 n.1 (Mo. Ct. App. 1984).
- (b) Service Member not Real Party in Interest=NO STAY.
 - (i) Tort Liability-Soldier Defendant Insured
 - (a) Boone v. Lightner, 319 U.S. 561, 569 (1943).
 - (b) Underhill v. Barnes, 288 SE2d 905, 907 (Ga. Ct. App. 1982) (Service Member defendant not prejudiced where plaintiff has agreed to limit tort recovery to insurance policy limits.)
 - (c) Hackman v. Postel, 675 F.Supp 1132 (ND Ill. 1988) (Service member is only nominal defendant in personal injury action, and insurance company may not assert the SSCRA.)
 - (ii) Subrogation Cases. Murphy v. Wheatley, 360 F2d 180 (5th Cir. 1966).
 - (iii) Custody Cases-Not a Necessary Party. --Bubac v. Boston, 600 So.2d 951 (Miss. 1992). Military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother.

(iv) Temporary Modification of Support.
--Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.

(c) Service member bad faith=NO STAY.

(i) Riley v. White, 563 So2d 1039 (Ala. Civ. App. 1990) (Soldier failed to submit to blood test in paternity action before going overseas, when aware of court proceedings, had attorney representation, and was previously given a delay by court to take test, denied stay.)

(ii) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) (Soldier for three years in contempt of court for refusing to comply with visitation orders of court, denied stay in ex-spouse's change of custody action.)

(iii) Judkins v. Judkins, 441 S.E.2d 139 (NC 1994). (Soldier receives several continuances because of military duty during Persian Gulf war, has attorney, fails to comply with court discovery orders, and seeks additional stay/continuances after discovery order disobedience.)

(3) What Type of Cases WILL courts find actual prejudice/material affect for SSCRA Stay?

- (a) Personal Injury Claims-Plaintiff/Actual Defendant. *Starling v. Harris*, 151 SE2d 163 (Ga. Ct. App. 1966) (Soldier only eyewitness to tort other than other party.)
- (b) Large Financial Disputes. *Mays v. Tharpe & Brooks, Inc.*, 240 SE2d 159 (Ga. Ct. App. 1977) (Service member sued on guaranty on \$50,000 promissory note. Stay granted.)
- (c) Contested Divorce, Custody, Paternity Cases.
 - (i) *Smith v. Smith*, 149 SE2d 468, 471 (Ga. 1966) (Error to deny stay in divorce action where alimony at issue.)
 - (ii) *Lackey v. Lackey*, 278 SE2d 811 (Va. 1981) (Change of child custody action involving servicemember's children, while he was unavailable to defend and had requested a stay, reversed).
 - (iii) *Mathis v. Mathis*, 236 So2d 755 (Miss. 1970) (Service member's absence in paternity action materially affects ability to defend, unless specific findings made otherwise.)
- (4) Court discretion- if court finds material affect, the court must order a stay. If the stay request is denied, the court must make findings of fact about lack of material affect, or ensure that there is sufficient evidence in the record to warrant denial. *Olsen v. Olsen*, 621 NE2d 830 (Ohio 1993).

6. Default Judgments (50 U.S.C. app. § 520).

a) Affidavit.

- (1) Must be prepared and filed by plaintiff.
- (2) Must state sufficient facts to give court reasonable basis to determine whether the respondent is in the military. *Mill Rock Plaza Associates v. Lively*, 580 N.Y.S.2d 815, 153 Misc.2d 254 (N.Y. City Civ. Ct. 1990)
- (3) Effect of failure to file.
 - (a) No entry of judgment until judge determines that the defendant is not in the military and has not requested a stay. *But see Interinsurance Exchange Auto. Club v. Collins*, 37 Cal. Rptr.2d 126 (Cal. App. 1994) (Clerk of Court may not refuse to enter a default judgment because no SSCRA affidavit is filed with the pleadings.)
 - (b) Remedy is not available to persons who are not in the military!
 - (c) Judgment obtained without affidavit is voidable not void.
 - (d) False affidavit subject to criminal penalties. 50 U.S.C. App. § 520(2).
- (4) Court-Appointed Attorney.
 - (a) Purpose. Ascertain whether the defendant is in the service and if so to request a stay on the defendant's behalf. *See State ex rel. Burden v. Smith*, 1994 WL 714505 (Ohio App 10 Dist., 22 Dec. 1994) (unpublished).

- (b) Compensation: No specific provision in SSCRA - look to state attorney appointment and compensation powers.
- (c) Effect of failure to appoint. Most cases, no sanctions against judge and failure to appoint is not an abuse of discretion or reversible error unless respondent can show he was prejudiced by the failure to appoint counsel. Marriage of Lopez, 173 Cal. Rptr. 718 (Ca. App. 1981); McDaniel v. McDaniel, 259 S.W.2d 633 (Tex. Civ. App. 1953) (Prejudicial error to approve judgment in child support modification case contested by the parties, without determination that party to action was in the military.)
- (d) Judgment obtained without appointment is also only voidable, not void.

7. Reopening Default Judgments, 50 U.S.C. App. § 520(4) .

- a) Judgment must have been entered during term of service or within 30 days after termination of service.
- b) Application must be made to court during term of service or within 90 days of termination.
- c) The service member cannot have made any appearance.
 - (1) Filing an answer either pro se or through counsel is an appearance.

(2) Letter from Legal Assistance Attorney to court may be an appearance!

- (a) *Skates v. Stockton*, 683 P.2d 304 (Ariz. Ct. App. 1984) (Even though court did not otherwise have personal jurisdiction, it determined that legal assistance attorney's letter requesting a stay constituted an appearance sufficient to give it personal jurisdiction; attorney failed to reserve defenses including jurisdiction). [hm1]
- (b) *Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750 (Wis. Ct. App. 1989) (Legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment). *But see* *Kasubaski v. Kasubaski*, 1996 Wis. App. LEXIS 1014 (Wis. Ct. App. 1996) (unpublished) (Court criticizes the reasoning of *Artis-Wergin*, and suggests it was wrongly decided.)
- (c) *But see* *Kramer v. Kramer*, 668 S.W.2d 457 (Tex. Ct. App. 1984); *Marriage of Lopez*, 173 Cal. Rptr. 718, 721 (Ca. App. 1981) (Appellate courts hold that defendant's letter or legal assistance attorney letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that was otherwise lacking).

(3) There is hope - some things are not appearances!

- (a) Letter from Commander to court. *Cromer v. Cromer*, 278 S.E.2d 518 (N.C. 1981) (Court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").

- (b) Letter to opposing counsel. *Sacotte v. Ideal-Werk Krug*, 359 NW2d 393 (Wis. 1984).
(Letter to opposing counsel asserting SSCRA does not constitute an appearance.)
 - (c) Sample SSCRA letters to opposing counsel and for Commanders to assert stay at Appendix A.
 - d) Criteria to re-open default.
 - (1) Military service prejudiced ability to defend, AND
 - (2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.
- 8. Stay or Vacation of Judgments, Attachments & Garnishments (50 U.S.C. § 523).
 - a) Military service materially affects ability to comply with judgment, court-ordered attachment, and/or garnishment, e.g. child support orders.
 - b) Court may stay execution of any judgment or court order entered against service member. Court may vacate or stay any court-ordered attachment or garnishment of property, wages, or money in the hands of another either before or after judgment. ISSUE: Administratively determined involuntary allotments for child support arrears enforcement not subject to this provision. See 42 U.S.C § 665; 5 C.F.R. § 581.302(b)(4); 32 C.F.R. § 584.9; 32 C.F.R. Part 541 (1996); and Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325, 363, 110 Stat. 2105 (1996).
 - c) DFAS, which processes all military garnishment requests for support orders, has rarely seen this SSCRA provision asserted by military members or legal assistance counsel.
- 9. Assessing the default judgment case.

- a) Can you afford to do nothing?
- b) Material affect and meritorious defense?
- c) Adverse action from default - garnishment or involuntary allotment? [Involuntary Allotment of military pay affects only RC soldiers on active duty > 180 days. DOD Dir. 1344.9, and DOD Instr. 1344.12.]

IV. INVOLUNTARY ALLOTMENTS AND THE SSCRA.

A. HATCH ACT REFORM AMENDMENTS - 1993.

- 1. Law prior to 1993 - Sovereign immunity prevented garnishment of federal employee pay except for family support. See, e.g., *Omega v. Koller*, 503 F. Supp. 149 (D.C. Md, 1980) (Consumer Credit Protection Act held not a specific waiver of sovereign immunity for garnishment).
- 2. Garnishment Equalization Act - Introduced as S. 316 in 101st Congress (Chief sponsor - Sen. Craig). Reintroduced as S. 253 in 102d Congress. Merged into Hatch Act Reform Amendments, P.L. 103-94; signed by President on October 11, 1993. Now codified at 5 U.S.C. § 5520a.
 - a) Waived sovereign immunity for civilian federal employee pay.
 - (1) Estimated annual defaulted debt of federal employees \$1.3 Billion.
 - (2) Estimated number of federal employees with defaulted debt based on Postal Service experience - 2% of federal workforce, including military.

- b) Directed DoD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers and Sailors Civil Relief Act...and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."

B. INVOLUNTARY ALLOTMENTS FOR CREDITOR JUDGMENTS -
DOD DIRECTIVE 1344.9; DOD INSTRUCTION 1344.12.

1. Initiation Procedure.

- a) Final order of court with specific money award, and DD Form 2653.
- b) Served on designated agent - DFAS - Cleveland.

2. Certifications [DD Form 2653]:

- a) Judgment not modified or set aside.
- b) Not issued while service member was on active duty. If the service member was on active duty, the SSCRA was followed fully.
- c) State law allows garnishment of a similarly situated civilian.
- d) Debt has not been discharged in bankruptcy or barred by other legal impediment.
- e) Creditor agrees to repay service member within 30 days if payment to creditor is erroneous.
- f) DFAS Information Sheet- Appendix C.

3. Amounts Available.
 - a) Pay includes - Disposable (generally taxable) pay (only).
 - b) Maximum amount of allotment - 25% of disposable pay or lower if state law provides for lower amount. The states of NC, SC, NH, PA, TX do not allow garnishment of wages for commercial debts, thereby precluding involuntary allotment actions from debt actions in those states.
 - c) Creditors now charged a \$75 processing fee out of their 25% pay allotment per the DoD Authorization Act of Fiscal Year 1996, Pub. L. No. 104-106, § 643, 110 Stat. 368, codified at 5 U.S.C. §§ 5520a (j)(2), (k)(3), and (l) [1996]. *See also* 61 Fed. Reg 53722 (15 Oct. 1996). This provision is being contested by creditors, as DoD is the only federal agency to deduct fees from the judgment amount.
4. DFAS action.
 - a) Facial review.
 - b) Mail notice [DA Form 2653] to service member [90 day clock starts].- No time limit for DFAS to issue notice. Mail two additional copies to the "immediate commander" with DD Form 2654.
5. Command action ("Immediate Commander").
 - a) Serve service member with copy of notice and DD Form 2654 (Rights Warning Form) [5 day req.]
 - b) Inform service member of rights to contest the involuntary allotment [15 days to respond].
 - c) Grant 30 day extension to respond if necessary. No response back to DFAS within 90 days from initiation of process results in automatic involuntary allotment.

6. Service member's actions.
 - a) Consent.
 - b) Seek legal assistance.
7. Service member defenses:
 - a) The SSCRA was not followed in the underlying judgment.
 - b) Military exigency caused the absence of the service member from appearance in a judicial proceeding which forms the basis of the judgment.
 - c) The application for allotment is false or erroneous in material part.
 - d) The judgment has been satisfied, set-aside, or modified.
 - e) A legal impediment (e.g. bankruptcy) prevents processing the allotment.
 - f) "Other appropriate reasons..." Violation of consumer law-underlying judgment.
8. Immediate Commander Response.
 - a) Rule on military exigency defense only.
 - (1) Standard of review - preponderance.

(2) Definition - "[M]ilitary assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."

- b) Provide name and address of appellate authority for military exigency appellate determination by creditor.
- c) Forward debtor response to DFAS. Debtor failure to timely respond results in automatic initiation of involuntary allotment.

9. DFAS decides all other defenses, except military exigency. No appeal of DFAS determinations.

V. SUSPENSION OF STATUTES OF LIMITATION (50 U.S.C. APP. § 525).

A. Tolls the running of the statutes.

- 1. During the service person's period of service.
- 2. With respect to civil and administrative proceedings.
- 3. Involving the service member as either plaintiff or defendant.
- 4. Except for the internal revenue laws! 50 U.S.C. App. § 527.

B. Issues.

1. Career Military - *Conroy v. Aniskoff*, 507 U.S. 511, 113 S. Ct. 1562, 123 L.Ed.2d 229 (1993).
 - a) The tolling applies regardless of whether the service member is inducted, volunteers, is a one-term or a career military member.
 - b) In addition, court held no requirement to show material affect.
2. Does "all proceedings" mean all?
 - a) Board for Correction of Military Records - tolled. *Detweiler v. Pena*, 38 F. 3d 591 (D.C. Cir. 1994) ("any" means "any"). *Detweiler* overrules other case law that indicated the BCMR statute was not tolled. (*Allen v. Card*, 799 F. Supp. 158 (D.C. 1992) (pre *Conroy*), *Miller v. United States*, 29 Fed. Cl. 107 (1993)(post *Conroy*)). Department of Defense requested a legislative override of *Detweiler*, which was included in the FY 1997 DoD Authorization Act bill, but was deleted in conference committee.
 - b) Merit Systems Protection Board - tolled, *Davis v. Dep't of the Air Force*, 51 M.S.P.R. 246 (1991).
 - c) Bankruptcy - tolled, *In re A.H. Robins v. Dalkon*, 996 F.2d 716 (4th Cir. 1993). "The statute contains no exceptions and is drafted in extraordinarily broad terms...The broad, unqualified and mandatory language of section 535 leaves little room for judicial interpretation...." *Id.* at 718.
3. Laches. The SSCRA provision does not prevent assertion of the equitable principle of laches. See *Detweiler v. Pena*, 38 F 3d 591, 595 (D.C. Cir. 1994). Laches = inexcusable delay by petitioner plus prejudice to respondent's ability to defend.

VI. ARTICLE III - RENT, LEASES, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND ASSIGNMENTS (50 U.S.C. APP. §§ 530-536)

- A. Protected Persons - Active Duty personnel and dependents in their own right.
- B. Protection from Eviction from Leased Housing (50 U.S.C. App. § 530).
 - 1. Premises occupied - must be a dwelling place of the service member or dependents.
 - 2. Rent may not exceed \$1200 per month. - changed from \$150 by Desert Shield/Storm amendments.
 - 3. Judicial Relief Available. Court shall upon application of service member or eligible dependent, and may, on its own motion grant the following:
 - a) Stay of eviction proceedings for up to 3 months, or,
 - b) Make any other "just" order.
 - c) Unless the court finds no material affect.
 - d) Criminal Sanctions for Landlord "self-help" eviction.
- C. Termination of Pre-Service Leases (50 U.S.C. App. § 534).
 - 1. Purpose: to permit lawful termination of a pre-service lease of premises by a service member entering active duty [or by his or her dependent in their own right (see § 536)].
 - 2. Criteria for relief.
 - a) The service member need NOT show material affect.

- b) The service member need only show:
 - (1) The lease was entered into prior to entry into military service,
 - (2) The lease was executed by or on behalf of the service member,
 - (3) The leased premises were occupied for dwelling, professional, business, agricultural, or similar purposes by the service member or the service member and his or her dependents, and
 - (4) The service member is currently in military service.
- c) Landlord may seek “equitable offset” for unreasonable costs/expenses incurred as the result of early military tenant termination, e.g., realty fees, cost of special fixtures installed at tenant request, etc. Such landlord equitable offset may be greater than the amount of tenant rent and security deposit remaining under the lease term. *Omega Industries, Inc., v. Raffaele*, 894 F.Supp. 1425 (D. Nev. 1995). *See also* Conrad, Note, *Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"*, *The Army Lawyer*, April 1997, at 153.

VII. INSTALLMENT CONTRACTS AND AUTO LEASES (50 U.S.C. APP. § 531).

- 1. Applies only to **pre-service obligations** by either service member or spouse who can show material affect as to ability to pay on installment contracts such as appliances, furniture, and motor vehicles.
- 2. Prohibits self-help repossession of items purchased on installment contract.
 - a) Leased automobiles or other items included if Option to Purchase Clause in lease agreement.

- b) SSCRA does not terminate automobile lease!
- 3. Criminal penalties for violating repossession provisions of this section.
- 4. Upon service member showing of material affect to a court a stay may be granted and the creditor may only seek repossession of the item purchased on installment contract by obtaining a court order after obtaining a judgment on the debt.
- 5. Practice Pointer in Auto Lease Cases: While you may not threaten criminal action to settle a civil matter, you may point out any potential violations of this section to a creditor or their counsel (self-help repossession), and suggest a possible settlement of the matter, by allowing the soldier to voluntarily surrender the vehicle in return for the creditor waiving all early lease termination penalties.

VIII. ENFORCEMENT OF STORAGE LIENS (50 U.S.C. APP. § 535).

- A. General: Persons with storage liens on property of service members may not exercise any right to foreclose or enforce any lien during the service member's period of military service and for three months thereafter except upon court order.
- B. Judicial Relief.
 - 1. Court shall (upon application by service member) and may upon its own motion,
 - a) Stay proceedings, or
 - b) Grant other equitable relief to conserve interests of all parties.
 - c) unless there is no "material affect" (if the service member's ability to pay the storage charge is not materially affected by service).

- C. Criminal Sanctions. Any person who knowingly takes any action contrary to this section, or attempts to do so, shall be fined as provided in 18 U.S.C., or imprisoned for not to exceed one year, or both. 50 U.S.C. app. § 535(3). *See, United States v. Bomar*, 8 F.3d 226 (5th Cir. 1993). [Note that the United States prosecuted criminally this case on behalf of the soldier].

IX. MORTGAGES, TRUST DEEDS, ETC. (50 U.S.C. APP. § 532).

- A. In court actions to enforce mortgage obligations, court shall (upon application by service member) and may (upon its own motion) grant relief to service member [or dependent pursuant to § 536] unless military service does not materially affect ability to comply with obligation.
- B. Criteria for relief.
1. Obligation is secured by a mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property,
 2. Obligation entered before entry into military service,
 3. Property owned by service member [or dependent] before entry into military service
 4. Property is still owned by service member or dependent at time relief is sought, and
 5. Military service materially affects ability to comply with terms of obligation, such breach occurring prior to or during period of such military service.
- C. Judicial relief:
1. Court shall (upon application by service member) and may upon its own motion,
 - a) Stay proceedings, and/or

- b) Grant other equitable relief to conserve interests of all parties (i.e., reduce or suspend installment payments)
 - c) unless there is no "material affect."
- 2. No sale, foreclosure, or seizure of property shall be valid if made during the period of military service or within 3 months thereafter, except pursuant to an agreement (§ 517), unless upon an order previously granted by the court and a return thereto made and approved by the court.

X. ARTICLE VII - FURTHER RELIEF [50 U.S.C. APP. § 590].

- A. Stay of Enforcement of Obligations, Liabilities, Taxes (50 U.S.C. App. § 590).
 - 1. Person may, at any time during military service or within 6 months thereafter, apply to court for relief of any obligation or liability incurred by such person prior to active service or in respect to any tax or assessment whether falling due prior to or during active military service.
 - 2. Court may grant stays of enforcement during which no fine or penalty shall accrue if service materially affected ability to comply with obligation or pay tax or assessment.
 - a) There need be no default or legal action pending to get protection, but applicant must prove "material affect." Application of Marks, 46 N.Y.2d 755 (1944).
 - b) Dependents receive protection. Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).
- B. Real World Problem : Reserve soldier (Physician) had pre-service BMW auto lease (7 series) he could not afford while on active duty during Desert Storm. He voluntarily gave it back to the dealer. After he returned from Desert Storm, the dealer sued him for \$31,000 deficiency. What should the soldier have done to try and prevent this? He should have used § 590 to get prospective relief from the lease obligation.

XI. CONCLUSION

SIGNIFICANT SSCRA PROVISIONS

<u>SSCRA Provision:*</u>	<u>Pre-Service Obligation</u>	<u>Service Obligation</u>	<u>Post-Service</u>
6% Interest Cap [Section 526]	Yes.	No.	No.
Civil Court Stay [Section 521]	No.(Only applies Active Duty)	Yes.	Yes. Up to 60 days
Reopen Judgment [Section 520(4)]	No.	Yes.	Yes. Judgments up to 30 days from discharge. Reopen up to 90 days from discharge.
Toll Statute of Limitation [Section 525]	No.	Yes. Civil & Admin Actions.	No.
Eviction Protection [Section 530]	No.	Yes. Rent<1200/mo	No.
Termination of Lease [Section 534]	Yes. Residential, Commercial/Prof.	No.	No.
Mortgage Foreclosure [Section 532]	Yes. Obligation was pre-service	No.	No.
Storage Liens Protection	Yes.	Yes.	Yes. Up to 3 [Section 535(2)] months from discharge.
Installment Contract/ Auto Leases [Section 531]	Yes. (Pre-service only)	No.	No.
Anticipatory Relief [Section 590]	Yes. (Pre-service obligation, liability,penalty or tax)	Yes. (Service obligation Liability, penalty or tax)	No. May apply during service or up to 6 months after to court.

*Section Numbers keyed to SSCRA as codified at 50 App. U.S. Code.

APPENDIX A

SAMPLE SSCRA LETTERS

Sample Letter to Creditor
Reduction of Interest Rate

[LETTERHEAD]

[Date]

Legal Assistance Office

[CREDITOR ADDRESS]

Dear **[Sir or Madam]**:

I am a legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** informs me that **[he/she]** is currently obligated to your company for a loan bearing an interest rate of **[%]**. I further understand that this obligation was entered into on **[DATE]**.

Since incurring this obligation, **[CLIENT]** has entered the active military service of the nation in the U.S. **[SERVICE]** on **[DATE]**. This entry into active military service has materially affected **[CLIENT]**'s ability to meet this obligation. Under these circumstances, federal law prescribes the maximum interest rate which **[CLIENT]** may be charged.

The Soldiers and Sailors Civil Relief Act (50 U.S.C. App. § 526) prescribes a ceiling of 6% annual interest on any obligation under the circumstances described above. This interest rate must be maintained for the entire period that **[CLIENT]** is on active duty. The percentage cap includes all service charges, renewal charges, and fees. The rate is applied to the outstanding balance of the obligation as of the date of entry onto active duty mentioned above. Any interest charge above this statutory ceiling must be forgiven, not accrued.

Please ensure that your records reflect this statutory ceiling and that any charges in excess of a 6% annual rate are withdrawn. You should also be aware that federal law (50 U.S.C. App. § 531) circumscribes the manner in which you may enforce certain rights under the contract, including any right to repossession of property.

I thank you in advance for your attention to this matter. Should there be any questions, please feel free to contact me at the address above.

Sincerely,

[ATTORNEY NAME]

[RANK], U.S. Army

Sample Letter to Opposing Counsel

Requesting a Stay of Proceedings

[LETTERHEAD]

[Date]

Legal Assistance Office

[COUNSEL'S ADDRESS]

Dear **[Sir or Madam]**:

I am a military legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** is the defendant in an action you filed on behalf of **[OPPOSING PARTY]** in **[COURT]**. The mission of our office is to provide initial counseling to soldiers to help them make more informed decisions about their legal obligations. We are not allowed to represent soldiers in any fashion in these types of civil actions. [ELAP jurisdictions delete the prior sentence.] I am not **[CLIENT]=s** attorney for the underlying matter and this letter should not be construed as an appearance or submission to jurisdiction. Rather, I am simply assisting **[CLIENT]** in protecting his interests until such time as he can obtain proper legal counsel.

[CLIENT] is currently in the active military service of the nation in the U.S. **[SERVICE]**. Federal law affords such service people certain rights prescribed by the Soldiers and Sailors Civil Relief Act. Among these rights is the stay of all legal proceedings during the period of active service when the service members ability to conduct a defense is materially affected. 50 U.S.C. App.   521. In this case, **[CLIENT]** informs me that he will not be able to attend any proceedings and protect his interests until **[DATE]**. This inability to appear is caused by **[REASONS]**, direct results of his military service. **[CLIENT]=s** inability to attend is supported by the attached memorandum from his commanding officer.

Because **[CLIENT]=s** military service prevents his appearance, I request that you advise the court of **[CLIENT]=s** status and request a stay until **[DATE]**. I further request that you advise **[CLIENT]** of any action you take at **[ADDRESS]**.

Thank you in advance for your help in affording **[CLIENT]** an opportunity to participate in the legal process while meeting his obligations to the defense of our nation.

Sincerely,

[ATTORNEY NAME]
[RANK], U.S. Army

Sample Letter to the Clerk of Court

Requesting a Stay of Proceedings

(NOTE: This letter should be prepared for the signature of the client's commanding officer. At least one court has construed a letter directly from a legal assistance attorney to be an appearance causing the client to lose valuable rights!)

[LETTERHEAD]

[Date]

Commander

[CLERK OF COURT ADDRESS]

Dear **[Sir or Madam]**:

I am an officer in the U.S. **[SERVICE]** writing on behalf of **[CLIENT]**, who is the defendant in an action now pending before your court, **[CASE ID NUMBER]**. **[CLIENT]** is currently serving in the active military service of the nation at **[INSTALLATION]**. He is assigned to my command.

[CLIENT] will be unable to attend any hearings, present any type of defense, or effectively protect his interests in the matter in question until **[DATE]** because of his military duties. Until this date, **[CLIENT]** is needed by this unit to/because **[REASONS]**¹. **I am advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their military service (50 U.S.C. App. 521). In this instance, [CLIENT]'s critical role in the national security mission of this command precludes his participation in court proceedings until [DATE]. He will be unable to present any defense at all due to his duties.**

¹ **Reasons** should clearly outline the duties to which the soldier must attend and why he cannot take leave. Examples would be **Ato participate in a unit deployment to the National Training Center,** **Ato deploy to Bosnia as part of the UN Implementation Force,** **or Ato prepare forces for deployment to Haiti.** Whatever reason is given, the reasons why the soldier is critical to this mission must be explained.

Request that you grant a stay in the proceedings until [DATE] to allow [CLIENT] to properly attend to both of his obligations. I will personally ensure that he is placed on leave immediately following the completion of the duties described above, so that he may appear at the next scheduled court date after [DATE]. I should note that I am not an attorney and am not making this request based on any attorney-client relationship between myself and [CLIENT]. I am not representing [CLIENT] with regard to the proceedings pending in your court. This letter should not be considered an appearance by [CLIENT]. Rather, it is a request in my capacity as a commander, charged with a mission supporting the national security of this nation, that you delay the proceedings to allow this soldier to perform his critical part in that mission.

Thank you in advance for your assistance in this matter. I request that you inform myself or [CLIENT], at the above address, of any action taken regarding this request.

Sincerely,

[COMMANDER NAME]
[RANK], U. S. Army
Commanding Officer

APPENDIX B

INVOLUNTARY ALLOTMENT INFORMATION

from DFAS

Military Commercial Debt Allotments

Commonly Asked Questions

1. How do I apply for an involuntary allotment?

A creditor may initiate this process against a military member by submitting an Involuntary Allotment Application (DD Form 2653) along with a certified copy of a final judgment issued by a civil court. An original and three copies of both the form and the judgment are required. Also, the application must contain the member's full name and social security number for positive identification. The completed package should be sent to the following address:

Defense Finance and Accounting Service-Cleveland Center
Attention: Code L
P.O. Box 998002
Cleveland, OH 44199-8002

A blank DD Form 2653 may be obtained by writing the address above or by calling (216) 522-5301. Please be sure to include your return address on any correspondence, not just on the mailing envelope.

2. How much time does it take after I send in the application to DFAS before payments begin?

The regulation which establishes the procedures DFAS must follow when processing these applications contains mandatory time allowances that the military member must be given to respond prior to an involuntary allotment being started. This will normally prevent DFAS from establishing an involuntary allotment until 90 to 120 days after the application is received. However, if the member responds quickly and does not contest the allotment, this time could be shorter.

3. How much of the member's pay can I get each month? What if there are other allotments in place?

The Consumer Credit Protection Act, 15 U.S.C. 1673, establishes the maximum amounts that may be withheld from individual's pay for garnishments or other legal process to satisfy commercial debts. This amount is 25 percent of the individual's disposable pay. Disposable pay is the gross pay minus certain authorized deductions such as income tax withholding or debts owed to the government. If the member already has other involuntary allotments in place, it is possible that you will have to wait until that debt is paid prior to receiving any money for your application. Also, if deductions are being made to satisfy child support obligations, it is possible there will be no funds available to satisfy commercial debts for many years to come. In this case, you will be notified by DFAS of the status of your application.

4. What is the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA)? How does it affect my application for involuntary allotment?

The SSCRA is a federal law which applies at all times, not just when we are at war. It was designed to protect the legal rights of those who have been called upon to serve their country in the military. There are many provisions in the SSCRA. Most of them allow a service member to delay certain legal actions if his military service affects his ability to participate in the proceeding. There are also provisions which affect a member's financial transaction, such as allowing for lowered interest rates on loans while a member is serving on active duty.

However, the portion that is relevant to military commercial debt allotments is 50 U.S.C. App. Sec 520. This section basically says that in any proceeding where the defendant has failed to make any appearance, prior to any default judgment being issued, the plaintiff must file an affidavit with the court stating whether or not the defendant is in the military service, or that the plaintiff is unable to determine that fact after a reasonable effort. If the plaintiff states either that the defendant is in the military service, or that they are unable to determine whether or not the defendant is in the military service, prior to any default judgment, the court shall appoint an attorney to represent the defendant and protect his interest.

The fact that a plaintiff or court do not follow this mandatory procedure does not make the judgment void. It does make the judgment voidable at the court's option upon a proper showing of certain proof by the defendant. However, in order to use the military involuntary allotment process, an applicant must comply with the statute. Pursuant to the implementing regulation, DFAS has been given the responsibility to ensure that the procedural provisions of the SSCRA have been complied with prior to starting an involuntary allotment for commercial debt against a military member.

Therefore, a judgment issued by a court against a military member, where SSCRA was not complied with, is unenforceable against the military pay of that member. Also, because the SSCRA says these procedures must be followed prior to a default judgment being issued, there is no way to go back, aside from vacating the judgment and starting the process again, to comply with the SSCRA after the fact.

5. Is there any fee for establishing the involuntary allotment?

Yes. Recent legislation has given DFAS the authority to collect an administrative fee for processing military commercial debt allotments. The fee is currently \$75.00. This fee will be deducted from the amount that is paid to the creditor. So, if you send in an application for an involuntary allotment to collect a judgment for \$500.00, and an involuntary allotment is established, you will receive \$425.00.

DFAS Home | Garnishment

Send E-mail comments to dfaslane@cleveland.dfas.mil

June 5, 1997

URL - <http://www.dfas.mil/money/garnish/mcda-qa.htm>

